UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2485

September Term, 2015

STEVEN RENARDO RUSH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 6, 2017

A jury sitting in the Circuit Court for Baltimore County convicted Steven Renardo Rush, the appellant, of three counts of attempted first degree murder, two counts of first degree assault, and three counts of use of a firearm in the commission of a crime of violence. The court sentenced the appellant to life in prison, with all but 90 years suspended.

On appeal, the appellant presents four questions, which we have rephrased:

> I. Did the trial court err by admitting into evidence video footage from surveillance cameras that showed him assaulting his wife?
>
> II. Did the trial court's manner of conducting *voir dire* deprive him of his right to a fair and impartial jury?
>
> III. Did the trial court abuse its discretion by refusing to rule on the admissibility of an impeachable prior conviction until after his direct examination, should he have decided to testify?
>
> IV. Did the trial court abuse its discretion by denying his motion for mistrial based upon the prosecutor's rebuttal closing argument?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

In the early morning hours of October 5, 2014, Delmar Hilliard, Charles Doughty, and Cheniel Ferguson were shot while sitting in a parked car outside the Tabu Social Club ("Tabu") in Catonsville. Jeffrey Rice, Kenan Snyder, and Jurina Elamin also were in the parked car, but escaped injury. As a result of these events, the appellant was indicted for three counts of attempted first-degree murder, six counts of first-degree assault, six counts of use of a firearm in the commission of a crime of violence, and one count of malicious destruction of property. Before trial, the State entered a *nolle*

prosequi on one count of first-degree assault and one count of use of a firearm in the commission of a crime of violence.[1] The remaining fourteen counts were tried to a jury on October 13, 14, and 15, 2015. The State called fourteen witnesses, including Hilliard, Doughty, Ferguson, and Snyder; Vicki and Richard Gonzalez, the co-owners of Tabu; and police officers and detectives. The appellant did not testify or put on any evidence. His theory of defense was two-pronged: lack of proof by the State of criminal agency or, in the alternative, lack of proof of an intent to cause serious bodily injury. The evidence adduced at trial, viewed in a light most favorable to the State, showed the following.

Tabu is a members only "swinger's club" for "couples and single females." It is located at 1115 North Rolling Road. Tabu memberships "belong" to the female member, but may be registered in the name of a couple. The female member is issued a membership card that must be presented upon entering the club. Member volunteers who staff the front desk require every person entering the club to produce a membership card and photographic identification ("ID"). If an ID does not match the name on the membership card or if the person does not match the photograph, entry will be denied.

Tabu has a seven-camera surveillance system, including four cameras monitoring the parking lot and one camera monitoring the public entrance at the front of the building.

[1] These two counts pertained to Doughty and were redundant of counts 8 and 9. The indictment did not include any counts pertaining to Snyder.

Surveillance footage from those cameras was introduced into evidence over the appellant's objection, as we shall discuss *infra*.[2]

Tabrina Harris, the appellant's wife, has a couple's membership to Tabu and the appellant is listed on her membership card. The surveillance video[3] showed a silver Chevy Equinox SUV, similar to one registered in Harris's name, enter the parking lot outside of Tabu around 9:15 p.m. on Saturday, October 4, 2014. Tabu is open from 9 p.m. to 3 a.m. on Saturday nights. The SUV parked in the second row of parking spots, facing the club. A man and a woman matching descriptions of the appellant and Harris are seen getting out of the SUV, walking up the front steps, and entering Tabu. The man has a tattoo under his right eye, which is consistent with the appellant's tattoo, and is wearing distinctive Adidas sneakers.

Patricia Fillman, a member volunteer, was working at the front desk that night. Tabu records show that she checked Harris and the appellant in at 9:22 p.m. She had no specific memory of doing so, but testified that she would not have permitted the appellant to enter unless she had checked his photo ID and confirmed that he was who he claimed to be.

[2] State's Exhibit 8 was a thumb drive containing the video captured by all of the cameras for the night of October 4, 2014, and the early morning of October 5, 2014. State's Exhibit 9 was a disc containing relevant excerpts of those video files.

[3] The excerpted video footage included views from two cameras. The first camera captured the parking lot directly in front of the club entrance, as well as the bottom of the stairs leading to the front door. The second camera was positioned directly above the front door, under an awning, and captured close-up video of the landing and the steps leading down to the parking lot.

Mr. and Ms. Gonzalez were working in the office that night, directly behind the front desk. Ms. Gonzales was monitoring the member volunteers and Mr. Gonzales was watching the video surveillance footage "in real time." Mr. Gonzales testified that Tabu had been having problems in the parking lot recently because of another late night establishment—a "hookah lounge"—that had opened next door months earlier. The hookah lounge had since been closed down, but many would-be patrons were unaware of the closure and continued to congregate in the parking lot used by Tabu.

Meanwhile, Hilliard, Doughty, Ferguson, Snyder, Rice, and Elamin, all of whom were in their early 20s, met up at a party at Security Square Mall. They traveled in three cars. Rice drove Ferguson and Elamin in Ferguson's white Honda Accord; Snyder drove his cousin, Doughty, in his car; and Hilliard drove alone. Sometime after 1 a.m. (on October 5), they left Security Square Mall and traveled to the parking lot outside of Tabu, where they had hoped to patronize the hookah lounge.

Mr. Gonzales testified that he remembered watching (on the live surveillance feed) as Rice drove Ferguson's Honda Accord into the parking lot a little before 2 a.m. Rice parked facing the club in the first row of parking spaces. He left the headlights on. Hilliard, Doughty, and Snyder also arrived in the two other vehicles and parked in a secondary parking lot. Hilliard, Doughty, and Snyder walked to the main parking lot, learned that the hookah lounge was closed, and piled into Ferguson's car. Ferguson climbed onto the front center console to make room for Hilliard to sit in the front passenger seat. Snyder sat in the rear middle seat, Doughty in the rear passenger side

seat, and Elamin in the rear driver's side seat. The friends talked about what to do next and checked social media on their phones, trying to find a party.

After they had been parked for about 15-20 minutes, they noticed people coming out of Tabu. At 2:08 a.m., the surveillance footage shows the appellant and Harris leaving Tabu. The Chevy Equinox was parked in the row of cars behind and to the left of Ferguson's car. As the appellant and Harris walked out of Tabu, she lit a cigarette. The appellant knocked it out of her mouth with the back of his hand. He then grabbed her forcibly by the left arm, causing her to trip and fall down. After she stood up, the appellant grabbed a wig off her head and threw it to the ground.

Harris walked down the steps on the right side of the club. The appellant followed close behind. At the bottom of the steps, he walked up on her right side, placed her in a headlock with his left arm, and began pulling her toward the parking lot. He punched her once in the face as they walked. The appellant dragged Harris between the two cars parked to the right of Ferguson's car, turned left and walked directly behind Ferguson's car. He then crossed to the second row of parked cars.

Rice and others in Ferguson's car witnessed the appellant assaulting Harris. Rice commented on it and Doughty and Hilliard turned to watch.[4] The surveillance footage shows that the headlights of Ferguson's car remained on, that the windows were fogged

[4] Doughty, who as mentioned was sitting in the rear passenger side seat, testified that he opened his door and stepped out of the vehicle to confront the appellant. The video surveillance footage does not show anyone get out of the vehicle, however, and Doughty did not tell the police he ever had gotten out of the car. Hilliard, Ferguson, and Snyder did not recall anyone getting out of the car.

up, and that there was movement inside the car as the appellant and Harris walked nearby.

The appellant pulled Harris to the passenger side of the SUV, opened the door, and pushed her in. He turned around abruptly and walked back toward Ferguson's car, approaching it from the rear passenger side. He bent down slightly, as if to look in the window, pulled out a gun, and fired at least five times through the window.

Ferguson testified that as the appellant approached the vehicle, Doughty said to him (through the closed window), "hey yo, what are you about to do?" The appellant replied, "what you say?" and then began shooting.

Immediately after firing into the car, the appellant walked quickly back to the SUV and drove away. Rice jumped out of the driver's side door, followed by Ferguson, and Hilliard. Hilliard ran inside Tabu, where he collapsed. Elamin climbed out of the rear driver's side door and dropped to the ground. Snyder ran after the SUV, trying to get its license plate number. Doughty collapsed on the back seat. Snyder and Ferguson both called 911.

Mr. Gonzales saw the shooting on the surveillance feed as it occurred and called 911 as well. He then began reviewing and compiling the surveillance footage for the evening.

Ten officers and three detectives from the Baltimore County Police Department ("BCPD"), as well as EMTs, responded to the scene. Doughty, Ferguson, and Hilliard were transported by ambulance to Shock Trauma at the University of Maryland Medical

Center. Doughty had been shot once in his right upper back; he was released later the same day. Ferguson had been shot once in her right shoulder; she also was released the same day. Hilliard was shot four times. One bullet hit his right ear and grazed the back of his head and the other three bullets hit him in the shoulder and upper back. He was hospitalized for several days.

Detective Parrish McClarin was the primary investigator on the case. He reviewed the Tabu surveillance footage and the club records and developed the appellant as a suspect. He ran a Motor Vehicle Administration check on the appellant and Harris and determined that a Chevy Equinox was registered in Harris's name. The address associated with her registration was a townhouse in College Park. Detective McClarin obtained an arrest warrant for the appellant and a search warrant for the College Park address and the Chevy Equinox. The warrants were executed the next day. The police recovered a pair of Adidas sneakers from the Chevy Equinox that matched those worn by the shooter as shown in the surveillance footage. From the townhouse, police recovered a gun case and several rounds of miscellaneous ammunition and mail addressed to Harris and the appellant.

At the conclusion of its case, the State entered a *nolle prosequi* on the charge of malicious destruction of property. Defense counsel moved for judgment of acquittal on the remaining thirteen charges. His motion was denied. After resting without putting on any evidence, he renewed the motion for judgment. The court denied it.

In addition to the charges of first-degree attempted murder, first-degree assault, and use of a firearm in the commission of a crime of violence, the jury also was instructed on the lesser included offenses of second-degree attempted murder, second-degree assault, and reckless endangerment. As discussed, the jury convicted the appellant of first-degree attempted murder (three counts), first-degree assault (two counts), and use of a firearm (three counts). This timely appeal followed.

DISCUSSION

I.

Before and during the trial, the appellant moved to exclude the portions of the Tabu surveillance footage that showed him assaulting Harris. He argued that the footage was prior bad acts evidence and, to the extent admissible to show motive or identity, any probative value it might have was outweighed by the danger of unfair prejudice. Alternatively, the appellant moved to exclude the video in its entirety on the ground that it was not properly authenticated. The court rejected these arguments and admitted the video excerpts showing the appellant and Harris arriving at the club and leaving the club, including the appellant's assault on Harris and the shooting.

a.

Prior Bad Acts Evidence

At a pretrial hearing, the court heard argument on the appellant's motion to exclude excerpts of the video as prior bad acts evidence. It ruled that the portions of the video showing the appellant and Harris leaving the club and the appellant assaulting

Harris had "special relevance in terms of identification." It found the State had met its burden of proving by clear and convincing evidence that the appellant was the man shown in the video, noting that he had the same tattoo.

The court further found that to the extent the video was prejudicial, the prejudice was minimal and was outweighed by its probative value:

> I think that while it's somewhat prejudicial, as is the nature of evidence, under the circumstances, it's not, given our society today and how violent our society is today, unfortunately, those few moments between the [appellant] and [Harris] is not particularly egregious by comparison. I'm not condoning any type of assault, you understand, but we see far more violent things every single day on television and the news, so on balance, it's not particularly egregious compared to what we see today so the Court is persuaded that the prejudicial effect, if any, quite frankly, would be outweighed by the probative value to offer that evidence.

The State offered the video into evidence during Mr. Gonzales's direct examination. Defense counsel renewed his objection. The court noted that during Ms. Gonzales's cross-examination, defense counsel had questioned her about security measures, suggesting that someone other than the appellant could have been admitted to Tabu with Harris. The court found that in light of that line of inquiry, the video's special relevance on the issue of identity was enhanced. The court otherwise reiterated its ruling that the prejudice to the appellant was minimal given the violence in society generally and the probative value was substantial and outweighed any prejudice.

As a threshold matter, the State contends the appellant waived his prior objection to the video footage by not objecting when Doughty and Hilliard testified that they saw

the appellant assault Harris and described the assault.[5] The State maintains that because their descriptions essentially "detailed what was on the video," the failure to object was a waiver. We agree with the appellant that this did not amount to a waiver because these eyewitness descriptions of an assault by a man on a woman, neither of whom were known to Doughty or Hilliard, were not the "same evidence" as the video showing the assault and shooting by a man with identifying features matching the appellant. *See, e.g.*, *Williams v. State*, 131 Md. App. 1, 26 (2000) ("When evidence is received without objection, a defendant may not complain about the *same evidence* coming in on another occasion even over a then timely objection." (emphasis added)). The appellant was not obligated to object to this testimony in order to preserve his challenge to the admission of the surveillance video.

On the merits, we hold that the court did not abuse its broad discretion in admitting the video. "Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of the person in order to show action in conformity therewith," but it may be admissible to show "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b). Before the court may admit prior bad acts evidence, it must apply a three-part balancing test. First, it must determine if the "'evidence fits within one or more of the [special relevancy] exceptions." *Streater v. State*, 352 Md. 800, 807 (1999) (quoting *Faulkner v.*

[5] The State also argues that the appellant should have objected during Ferguson's testimony. Ferguson did not testify to having witnessed the assault, however. She only testified that she heard someone in the car say that he had witnessed the assault.

State, 314 Md. 630, 634–35 (1989)). If an exception applies, the court must determine whether the State has proved by clear and convincing evidence the defendant's involvement in the prior bad act. *Id*. Finally, the court must weigh "the need for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission.'" *Id*. at 810 (quoting *Faulkner*, 314 Md. at 635).

In the case at bar, the appellant does not dispute that the excerpts of the surveillance video showing the assault on Harris were specially relevant to the disputed issues of identity and motive and that the State proved by clear and convincing evidence that the appellant was the perpetrator of that assault. He argues that the court abused its discretion by its balancing of the probative value of the video against its prejudicial effect. He maintains that a violent domestic assault falls at the more prejudicial end of the spectrum and that the court erred by minimizing the prejudicial effect by reference to the generally violent nature of society. We disagree.

The video was highly relevant to show identity. None of the victims were able to identify the appellant as the shooter. Hilliard and Doughty both testified, however, that the man they witnessed assaulting a woman in the parking lot was the same man who shot them. The video depicted a man with the same hairstyle and face tattoo as the appellant entering the club with a woman who looked like Harris. It showed that same man leaving the club with the same woman hours later, assaulting her in the parking lot, returning to the same SUV, which matched a vehicle registered in Harris's name, and then walking over to Ferguson's car and shooting into it. The video also was relevant to

prove motive. The video showed that Ferguson's car had its headlights on and there was movement in the car when the appellant assaulted Harris in view of its occupants. Thus, it was evidence that the appellant would have realized that people in that car had observed him assaulting Harris, providing motive for him to shoot into the car seconds later.

The court plainly did not abuse its broad discretion by determining that, weighed against this substantial probative value, the video depicting the appellant assaulting Harris was not so prejudicial as to bar admission of the video. As we observed in *Oesby v. State*, 142 Md. App. 144, 167–68 (2002), a trial judge conducting the Rule 5-404(b) balancing test should only be reversed in "those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so." This is not such a situation. The court did not minimize the prejudicial impact of the video, but properly balanced it against its significant probative value.

b.

Authentication

The appellant argues that the State failed to properly authenticate the excerpts of the surveillance video by either of the two accepted methods: personal knowledge testimony or "silent witness" testimony. The State responds that the video was properly authenticated through the testimony of Mr. Gonzales and that, in any event, any error in the admission of Exhibit 9, which as mentioned included excerpts of the surveillance

video, was harmless beyond a reasonable doubt because Exhibit 8, the original video, was admitted into evidence without objection.

Authentication of evidence is governed by Rule 5-901. The Court of Appeals has explained that "[a]uthentication . . . [is] 'the act of proving that something (as a document) is true or genuine, esp[ecially] so that it may be admitted as evidence.'" *Sublet v. State*, 442 Md. 632, 655-56 (2015) (quoting Black's Law Dictionary 157 (10th ed. 2014)). "'"The bar for authentication of evidence is not particularly high."'" *Id*. at 666 (quoting *United States v. Vaynor*, 769 F.3d 125, 130 (2d Cir. 2014), in turn quoting, *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007)). Video evidence may be authenticated either by "the testimony of a witness with personal knowledge" or "by the presentation of evidence describing a process or system that produces an accurate result," known as the "silent witness" method. *Washington v. State*, 406 Md. 642, 652 (2008).

In the case at bar, Mr. Gonzalez testified that he had installed the video surveillance system a few months prior to the shooting. He described the locations of all the cameras and the directions they faced. He explained that on October 4-5, 2014, he was watching the surveillance feed in "real time" because the recently closed hookah lounge had catered to a younger, rowdier clientele, leading to issues on the parking lot. Just before the shooting, he was watching Ferguson's car because he had seen it arrive and had noticed three men (Snyder, Doughty, and Hilliard) walk over and climb inside it. He observed the shooting on the video as it occurred. He immediately called 911 and began reviewing the surveillance video for the night and putting it onto a thumb drive to

give the police. He did not "change or manipulate the data that was contained on th[e] thumb drive." He verified that the surveillance video on the thumb drive "fairly and accurately depict[ed] the surveillance information" provided to BCPD. This plainly was testimony based upon personal knowledge that the surveillance system was accurately capturing the Tabu parking lot on October 4 and 5, 2014, and was sufficient to meet the State's slight burden to show that the video was what it purported to be.

II.

The appellant raises three challenges to the way in which the trial court conducted *voir dire*. First, he asserts that the court posed "compound questions" to the venire, in violation of the holdings in *Dingle v. State*, 361 Md. 1 (2000), and *Pearson v. State*, 437 Md. 350 (2014). Second, he argues that the way in which the court posed "the 'police bias' question was tantamount to a failure to ask the question." Finally, he maintains that the court abused its discretion by refusing to ask the prospective jurors whether any of them had been the victim of a crime, instead of asking whether any of them had been the victim of a "violent crime."

The State responds that the appellant has waived his challenges to the compound questions and the police bias question and, even if not waived, any error does not rise to the level of plain error. The State maintains that the court did not abuse its discretion in its formulation of the crime victim question.

a.

Waiver

The appellant concedes that he failed to object to the compound questions or to the police bias question. He asks us to exercise our discretion to review these issues under the plain error doctrine.

To take cognizance of plain error, we apply a four part test:

> First, there must be an error or defect—some sort of "[d]eviation from a legal rule"—*that has not been intentionally relinquished or abandoned, i.e., affirmatively waived*, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the . . . court proceedings." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Meeting all four prongs is difficult, "as it should be."

State v. Rich, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, (2009)) (emphasis added) (citations omitted). In the case at bar, the appellant is not entitled to plain error review because he affirmatively waived these contentions of error. We explain.

As pertinent, the appellant asked the court to pose the following questions during *voir dire*:

> 5. Are any of you friendly, associated with, or related to anyone in the [BCPD] or any other law enforcement agency?

*** * ***

> 7. Have any of you ever served on a Grand Jury or a Criminal Jury? Would that in any way affect your decision with this case or your ability to be fair and impartial in reaching your decision?
>
> 8. Would any of you tend to believe the testimony of a Police Officer more than the testimony of some other witness merely because of the fact that this person is a Police Officer? If so, please raise your hand.

The court posed the appellant's questions 5 and 7 but used a two-step process in doing so. First, the court asked prospective jurors to stand if they answered in the affirmative to the question and, second, the court asked those prospective jurors to remain standing and approach the bench only if "that fact [would] prevent you or substantially impair you from rendering a fair and impartial verdict if selected as a juror in this case." The appellant did not object to this means of proceeding.

The court asked the appellant's question 8 in an altered form. The court advised the venire that if they were selected to sit on the jury, they would be tasked with judging the credibility of witnesses and asked if any of the prospective jurors "would automatically give more or less weight to the testimony of any witness merely because of the witness' [sic] title, profession, education, occupation, or employment?" The court clarified that question by giving an example of a physician witness and then asked the venire:

> [I]f you were selected as a juror in this case, would you be able to judge the credibility of each witness' [sic] testimony based on the totality of their testimony, rather than merely relying on his or her title, profession, education, occupation or employment. For example, would any of you automatically give more or less weight to the testimony of a physician, a clergyman, a police officer, a fire fighter, a psychiatrist, a social worker, or any other witness merely because of their title, profession, education, occupation or employment? If so, please stand.

The appellant did object to this question as given.[6]

After the court finished posing the *voir dire* questions, but before the selection process began, the court had counsel approach the bench and asked the prosecutor if she had any exceptions to the *voir dire*. The prosecutor asked the court to pose one additional question. The court then asked defense counsel, "Anything else?" Defense counsel replied, "The only thing I would bring up, Judge, is [a crime victim question he had requested earlier.]" The court gave defense counsel the opportunity to place that question on the record and then asked, "Anything else then?" Defense counsel did not note any other exceptions.

We have explained that "[w]aiver 'extinguishes the waiving party's ability to raise any claim of error based upon that right.' . . . 'Thus, a party who validly waives a right may not complain on appeal that the court erred in denying him the right he waived, in

[6] This Court recently certified a question of law to the Court of Appeals pertaining to this issue:

> Did the circuit court err in declining to ask prospective jurors trial counsel's proposed voir dire question as to whether prospective jurors would "give greater weight to the testimony of a police officer based on the officer's occupation' and instead, asked whether the prospective jurors would 'give more or less weight to the testimony of a physician, a clergyman, a firefighter, a police officer, psychiatrist, social worker, electrician or any other witness merely because of their title, profession, education, occupation or employment?"

See Ukeenan Nautica Thomas v. State of Maryland, Misc. No. 25, September Term 2016. Unlike in the case at bar, in *Thomas*, defense counsel objected to the "police bias" question as posed by the trial court and asked the court to propound his proposed *voir dire* question as written. Thus, the defendant in that case did not seek to invoke plain error review.

part because, in that situation, the court's denial of the right was not error.'" *Brice v. State*, 225 Md. App. 666, 679 (2015) (quoting *Brockington v. Grimstead*, 176 Md. App. 327, 355, (2007), *aff'd*, 417 Md. 332 (2010)). In the context of *voir dire*, we have held, moreover, that a defendant waives any appellate challenge to the failure to ask a proposed question when defense counsel "respond[s] 'No' to the court's request for any further comment or objection to the *voir dire* questions that had been asked." *Id*.

In the case at bar, when defense counsel was given the opportunity to except to the form or the substance of the questions relative to prior service on a jury, affiliation with law enforcement, and bias in favor of police officer testimony, he advised the court that his only objection was to its failure to pose another, unrelated, question. This was an affirmative waiver of these other claims of error and precludes plain error review. [7]

b.

Crime Victim Question

The appellant proposed the following *voir* dire question: "Have you, any members of your families, or any close friends ever been the victim of a crime or the complaining witness in a criminal case?" The court declined to pose this question, noting that in *Pearson*, 437 Md. at 350, the Court held that this question is not mandatory. Instead, the court asked the venire to "stand if you or a member of your immediate family has ever

[7] With respect to the prior jury service question, the appellant's issue also is waived because the question as requested and the question as posed by the court *both* were compound questions. The appellant may not be heard to complain on appeal that the compound formulation of that question was error, much less plain error, when he asked for it to be posed to the jury in that manner.

been the victim of a violent crime or a witness to a violent crime." The court clarified that "by violent crime," it meant "things like attempted murder or murder, robbery, rape, some people consider burglary a violent crime." Defense counsel noted an exception to this question as given.

In *Pearson*, the defendant was charged with various drug related offenses. During *voir dire*, he excepted to the court's refusal to ask a question proposed by his co-defendant concerning whether any of the prospective jurors, their families, or friends ever had been the victim of a crime. His case reached the Court of Appeals, where he argued that the trial court abused its discretion by not asking that question, because it was "reasonably likely to reveal specific cause for disqualification" or to "facilitate the exercise of peremptory challenges." *Id.* at 356. The Court of Appeals disagreed, holding that the "trial court need not ask during *voir dire* whether any prospective juror has ever been the victim of a crime[,]" for three reasons. *Id*. at 357. First, the experience of a crime victim "lacks 'a demonstrably strong correlation with a mental state that gives rise to [specific] cause for disqualification.'" *Id*. at 359 (quoting *Curtin v. State*, 393 Md. 593, 607 (2006) (emphasis in *Curtin*)). Second, the question may be too time consuming. *Id*. Third, the court is required to ask (if requested) whether any juror has "'strong feelings about' the crime with which the defendant is charged" and this question is better tailored to reveal bias.[8] *Id*. at 360.

[8] Here, the appellant did not request a "strong feelings" question.

In the case at bar, the court declined to ask the broadly worded "crime victim" question as proposed by the appellant, but did ask the prospective jurors if they or someone close to them ever had been a victim of a violent crime. Given that the crime victim question is not mandatory, the court did not abuse its discretion by asking a narrower form of that question than proposed by the appellant.

III.

The appellant contends the trial court erred by deferring its ruling on the admissibility of his prior conviction for a narcotics violation unless and until his direct examination was complete. As mentioned, the appellant ultimately decided not to take the stand at trial. We decline to consider this contention because it is unpreserved. We explain.

During a break in the State's case, the court asked defense counsel to advise the appellant about his right to testify. During that advisement, defense counsel noted that the prosecutor could seek to "impeach [him] with certain convictions." Later during the colloquy, the prosecutor advised the court that the appellant had one impeachable conviction for possession with intent to distribute cocaine, from 2006. Defense counsel argued that any evidence of that conviction should be excluded because the charges against the appellant were not drug-related and admission of the conviction would be unfairly prejudicial. The court noted that, in its view, the opposite was the case: the drug conviction would be less prejudicial because it was for a crime unlike the pending charges. It deferred ruling on the admissibility of the conviction, however, because it did

not have "enough information . . . to evaluate whether that prior conviction would affect [the appellant's] credibility." The court advised defense counsel that it would make that determination if the appellant elected to testify and, if so, after his direct examination. The court asked the appellant if he understood that and the appellant replied, "I fully understand." Defense counsel did not object to the court's decision to defer ruling on the admissibility of the appellant's narcotics conviction or ask that the ruling be made in advance.

On the third day of trial, defense counsel advised the court that the appellant had elected not to testify. At no time before then did defense counsel seek a ruling on his motion to exclude the prior conviction or provide a proffer to the court of the appellant's expected testimony. In light of the appellant's failure to object, this issue is not preserved for appellate review.

IV.

As discussed, the jury was instructed on the lesser charge of reckless endangerment, in addition to the more serious charges of first and second degree attempted murder and first and second degree assault. The jury was instructed and the verdict sheet reflected that the jury only could convict the appellant of reckless endangerment if it acquitted him of all the other charges.

During his summation, defense counsel argued that the appellant did not intend to cause "serious bodily injury" and that this was a reckless endangerment case. In rebuttal, the prosecutor responded to that argument:

> And, again, . . . [defense counsel] wants you to abandon your common sense by telling you that you should be finding the Defendant guilty of the *misdemeanor* of reckless endangerment. Folks, you have the video. It shows the lights are on in that car. The foggy windows that [defense counsel] talks about, those foggy windows tell any rational, reasonable person that there are people inside that car on that cold night[.] . . . Ladies and gentleman, you know who did this. You know that this was an attempted first degree murder and accompanying first degree assaults. This was not the *misdemeanor* of reckless endangerment.

(Emphasis added.)

After the prosecutor concluded her rebuttal argument, the court made closing remarks to the jury and sent them to lunch. At that point, defense counsel asked to approach the bench and moved for a mistrial "based on the closing argument of [the prosecutor], when she allude[d] to the fact of misdemeanor." He argued that the prosecutor was not permitted to "address a charge in that way so that that minimizes the charge . . . basically . . . giving the jury this illusion or this belief that it is so minor that if you find him guilty only of that, it's not fair." According to defense counsel, the prosecutor's remarks were tantamount to commenting on the sentencing ranges for different offenses.

The court asked defense counsel why he had not "object[ed] to it at the time to allow the Court to cure any error, if indeed there was one?" Defense counsel responded that it "didn't register with [him] right away." The court noted that it was unlikely that the jurors even knew the meaning of the term "misdemeanor," but decided to hold the matter *sub curia* to give the parties an opportunity to research the law and make additional argument after the lunch recess.

When the court reconvened, the judge advised counsel that the jury had returned from lunch but had been told not to begin deliberations. Defense counsel argued that a mistrial was warranted because the prosecutor's reference to the "misdemeanor of reckless endangerment" was prejudicial and the prejudice could not be cured. The prosecutor responded that, to the extent that her reference to a "misdemeanor" was erroneous, she would not oppose the court's giving a curative instruction.

The court denied the motion for mistrial. It stated that it was not persuaded that the prosecutor's remarks were analogous to her having "comment[ed] on the possible penalties." It determined that, under the totality of the circumstances, including the length of the closing arguments and the fact that the jury had been instructed that arguments are not evidence, a mistrial was not warranted. It noted that defense counsel had not objected immediately after the prosecutor finished her rebuttal argument. The court offered to give the jurors a curative instruction before sending them to commence deliberations. Defense counsel declined that invitation, reiterating his position that the prejudice could not be cured.

As this Court has explained:

> A mistrial is an extreme remedy and it is well established that the decision whether to grant it is within the sound discretion of the trial court. *Carter v. State*, 366 Md. 574, 589, 785 A.2d 348 (2001). When inadmissible evidence or improper information has come before the jury, the trial judge "must assess [its] prejudicial impact . . . and assess whether the prejudice can be cured." *Id*. If the prejudice cannot be cured, "a mistrial must be granted." *Id*. When a trial judge decides that the prejudice can be remedied by a curative instruction, and denies the mistrial motion and gives such an instruction, appellate review focuses on whether "the damage in the form of

> prejudice to the defendant transcended the curative effect of the instruction." *Kosmas v. State*, 316 Md. 587, 594, 560 A.2d 1137 (1989).

Walls v. State, 228 Md. App. 646, 668–69 (2016).

The appellant contends the trial court abused its discretion in denying his motion for mistrial because the prosecutor's two references to the "misdemeanor of reckless endangerment" violated the rule that "a jury should not be told about the consequences of its verdict—the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not with what happens as a result of its decision on that issue." *Mitchell v. State*, 338 Md. 536, 540 (1995). This argument lacks merit. The prosecutor's reference to the "misdemeanor" nature of the charge of reckless endangerment did not amount to a comment on the penalties that might flow from a conviction for that offense, as opposed to the more serious charges. On that basis alone, we would hold that the court did not abuse its discretion by denying the motion for mistrial.

Even if the prosecutor did improperly remark upon the misdemeanor nature of the charge, however, the court did not abuse its discretion. The prosecutor made two references to the misdemeanor nature of the offense over the course of lengthy closing arguments. The court found that it was unlikely that the jurors even understood the meaning of the term "misdemeanor," a finding that is entitled to some deference. Moreover, it was clear from the jury instructions, defense counsel's closing argument, and common sense that reckless endangerment was a lesser offense than first degree (or second degree) attempted murder and first degree (or second degree) assault. The prosecutor's reference to the "misdemeanor" nature of the lesser offense did not invite

the jury to consider the sentencing ranges for each offense, but merely reminded the jurors that the appellant's conduct in shooting into an occupied car evidenced an intent to cause serious bodily harm, not mere recklessness. Thus, even if the jurors understood the term misdemeanor, any prejudice to the appellant flowing from the prosecutor's remark was minimal.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.